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Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1952.

No. 462

UNITED HOISTING CO., INC. and LOCAL NO. 15C, INTERNATIONAL UNION OF OPERATING ENGINEERS, A. F. L.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, for the Third Circuit.

EDWARD D. BOLTON,
Counsel for Petitioners.

WILLIAM J. CORCORAN,
Attorney for Local 15C, International Union of Operating Engineers, A. F. L., Petitioner.

HAROLD L. LUXEMBERG,
Attorney for United Hoisting Co., Inc., Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1952.

No. .....

UNITED HOISTING CO., INC. and LOCAL NO. 150, INTERNATIONAL UNION OF OPERATING ENGINEERS, A. F. L.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, for the Third Circuit.

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals, for the Third Circuit, entered in the above entitled case on September 2, 1952.

Opinions Below.

The Trial Examiner's Intermediate Report dated July 13, 1950 (B. A. 79a) and the Decision and Order of the National Labor Relations Board (B. A. 114a-127a) are reported in 92 NLRB 1642. The opinion of the United States Court of Appeals, Third Circuit (R. A. 68) is reported in 198 Fed. 2d 465.

Jurisdiction.

The jurisdiction of this court is invoked under Title 28 USC, Section 1254 (1).

Questions Presented.

(1) Whether the Law Assistant to the Chairman of the National Labor Relations Board may properly prosecute an unfair labor practice proceeding before a Trial Examiner.

(2) Whether the National Labor Relations Board may properly sit in review of a decision of a Trial Examiner involving close questions of fact and law in a proceeding prosecuted by a Law Assistant to one of its members, particularly where no testimony is adduced to determine the status of said prosecutor following the conclusion of the trial when his authority to prosecute was attacked.

(3) Whether the National Labor Relations Board may amend its final decision one year following its issuance without adducing additional evidence upon which it bases its findings that the Prosecutor was transferred to the Staff of the General Counsel from his position as Law Assistant to the Chairman of the National Labor Relations Board, particularly in the light of its explanation before the Court of Appeals that such transfer was limited to the trial of this case and solely to give him experience.

Statutes Involved.

The pertinent statutory provisions are printed in the appendix—*infra*, pages 11-13.

Statement.

The National Labor Relations Board pursuant to Section 10 (e) of the Act, as amended, petitioned the Court of Appeals for enforcement of its order issued against the United Hoisting Co., Inc. and Local 15C, International Union of Operating Engineers, A. F. of L., which order is dated January 26, 1951 and as amended January 9, 1952.

The complaint served upon the Union alleges that on January 14, 1949 it caused the Company to discharge Edwin H. Huegel from its employ upon the failure of Huegel to become a member of the Union. It is alleged that the Union restrained and coerced the employees of the Company in the exercise of their rights under Section 7 of the Act by executing on April 1, 1948 a written addenda amending a written contract entered into on June 18, 1947 which required membership in the Union as a condition of employment. The complaint further alleges that the agreement and amendment thereto have no legal force or effect and are invalid and in violation of the Act.

The Company is engaged in the rental and sale of construction equipment to contractors engaged in the building construction industry and is located in Englewood, New Jersey. The Union is a labor organization intimately connected with the building construction industry in that its members repair and maintain construction equipment, such as cranes, shovels, bulldozers, pumps, and the like. On June 18, 1947, the Union entered into an agreement with the Construction Equipment Rental Association of which the Company is a member, which is General Counsel's Exhibit #3. Article XI which is entitled "Duration" reads as follows:

> "This agreement enters into force on April 1st, 1947, and shall continue in force until changed by

agreement between the parties. No change shall be made prior to December 31st, 1948, and not then unless written notice asking that changes be considered is given by one party to another on or before November 1st, 1948, by registered mail."

On April 1, 1948 an addenda was executed between the contracting parties, General Counsel's Exhibit #4, which modified the agreement of June 18, 1947 to the extent that the hourly wage scale in two particulars was increased. The addenda also provided that no change should be made in the agreement prior to December 31st, 1950 in lieu of the existing requirement which provided for no change prior to December 31, 1948. The addenda further clarified existing provisions of the June 18, 1947 agreement without making any changes therein. It was also agreed between the parties in the addenda that nothing should disturb the presently existing contract dated June 18, 1947 from continuing in full force and effect.

On October 11, 1948, Edwin H. Huegel was hired as a welder by the Company and continued in its employ until January 14, 1949 when he was laid off for lack of work. Three days following his lay off, Huegel filed charges with the Board alleging that his separation was a discriminatory discharge, based upon his failure to join the Union. The Union in its answer denied that the discharge of Huegel was discriminatory and set up an affirmative defense that said Huegel was laid off for cause in accordance with the Company's rules of seniority, because of lack of sufficient work for said employee. The Union set up a second affirmative defense under Section 102 of the Labor Management Relations Act, 1947 in that the agreement of June 18, 1947 was entered into prior to the effective or enactment date of said Act and thus fell within the protection of such Section 102. During the course of the hearing, a third affirmative defense was entered by

the Union under Section 10 (b) of the Act in that the alleged violation of the Act occurred more than six months prior to the serving of the complaint and charges upon the Union.

After the case was tried and the Intermediate Report of the Trial Examiner issued, investigation by counsel for the Union showed that the trial was conducted by Melvin J. Welles, Esq., the Law Assistant to the Chairman of the Board. In a letter dated September 5, 1950, Mr. Louis R. Becker, Acting Executive Secretary of the Board (R. A. 56a) informed the counsel for the Union that Mr. Welles had been employed as a Legal Assistant to one of the Board members since 1947, and that he was detailed to the New York Regional Office from March 27, 1950 to May 1, 1950 for the purpose of acquainting Legal Assistants to Board members with field practice. During the period of one month that Mr. Welles was assigned to the New York office his sole duty was to prosecute the instant case before the Trial Examiner, following which he returned to Washington and presumably resumed his duties as Law Assistant to the Chairman of the Board.

After the decision and order of the Board were issued on January 26, 1951, an order amending this decision and order was issued on January 9, 1952, almost one year later. The Board by its original decision and order found there was no merit to the exception made that the case was tried by a Legal Assistant to one of the Board members, as said Legal Assistant had been transferred to the staff of General Counsel. The amended decision and order struck out this finding in its entirety.

The court below affirmed the decision and order of the Board in 198 Fed. 2d 465.

The court below had occasion to pass upon a similar problem in the case of *N.L.R.B.* v. *Kanmak Mills, Inc.*, C. A. 3, No. 10,555, October 26, 1951 (not otherwise reported) and decided it contrary to the manner in which

it decided the instant case. In the *Kanmak Mills* case, when objection was made before the Court of Appeals that the person who prosecuted the case before the Trial Examiner was still a Law Assistant to Paul M. Herzog, Chairman of the Board, the Court of Appeals, Third Circuit, remanded the case to the Board for the purpose of taking testimony and determining whether the prosecutor participated or advised both in functions of investigation or prosecution and in functions of decision contrary to the prohibition of Section 5 (c) of the Administrative Procedure Act. Accordingly, in that case, the Board issued an order reopening the case and directing a further hearing be held in accordance with the order of remand.

In the instant case, the Court below not only failed to find any violation of the division of duties required under the Taft-Hartley Act, but also declined to remand the case for the purpose of taking testimony to determine the true status of the prosecutor. The Court below described the practice of the Board as "laudable" saying that it "functioned with the highest sense of responsibility for its obligations under the Act."

The Court below has acted in the two cases in which this problem arose before it in diametrically opposite manners. It is an accepted fact that the Taft-Hartley Law in its entirety has been the subject of sincere and profound controversy since its enactment. At least the administration of this Act should be meticulously adhered to in accordance with the intent of the Congress, namely, that there shall be a division between the functions of the Board which acts as a judicial body and those of the General Counsel who acts as a prosecutor. Nevertheless, in the opinion below, the Court of Appeals considered it advisable to state that the Board's patent violation of the Act was laudable, notwithstanding there was no evidence in the record upon which the Court could draw this conclusion. The only explanation offered by

the Board was done by way of a supplemental mimeographed brief consuming over twelve pages of argument to which was attached Bulletin #69, dated December 8, 1949, entitled "Training Program for Board Legal Assistants." A perusal of this Bulletin will show that the training program aforesaid was agreed to by the Board and General Counsel and provided for Law Assistants "to attend" complaint case hearings in addition to assisting Field Examiners or Attorneys conducting various types of investigations, elections, settlement negotiations and enforcement, for thirty to sixty day details in Regional Offices. Nothing contained in said Bulletin provides for the prosecution of trials by said Legal Assistants. The travel and per diem expenses of Legal Assistants under this training program were not to be charged to the Regional Office Allotment Account, but to a special Account in Washington.

Specifications of Errors to Be Urged.

The Court of Appeals erred:

1. In holding that the National Labor Relations Board in assigning the Law Assistant to the Chairman of the National Labor Relations Board to prosecute the instant case before the Trial Examiner did not violate the prohibitions contained in the Taft-Hartley Law and the Administrative Procedure Act.

2. In failing to reverse the decision and order of the Board or in failing to remand the case for the purpose of taking testimony or evidence to demonstrate whether the Law Assistant to the Board Chairman was in fact transferred to the Office of the General Counsel or merely detailed or loaned.

3. In failing to judicially determine whether the Board and General Counsel were empowered under the Act to institute a training program for Board Legal Assistants which had the effect of violating the Taft-Hartley Law.

4. In failing to condemn the practice of the Board in assigning its Law Assistants to try cases as prosecutors in flagrant violation of the Act and the fundamental division and separation of duties under our democratic processes.

5. In affirming the decision and order of the National Labor Relations Board.

Reasons for Granting the Writ.

1. To quiet, cement and unite the two large, opposing segments of the Nation's population of Labor and Management by assuring them that the Taft-Hartley Law is honorably and fairly administered in accordance with the intent of Congress and the fundamental democratic concepts of judicial process.

2. Settlement of the question of assigning Law Assistants to Board members to act as prosecutors in cases involving the Taft-Hartley Law is plainly in the public interest since it is likely to occur again in unfair labor practice proceedings before Trial Examiners throughout the country, many of which are pending at the present time.

3. The decision of the Court below is believed to be erroneous not only on the ground that it violates the letter and spirit of the Taft-Hartley Law, but is contrary to that Court's own decision in the *Kanmak Mills* case, supra, as well as the other cases cited.

4. The failure of the Board to take seriously the mandate of the Congress as outlined in the Taft-Hartley Law to keep separate and apart the division of duties between the Board as a judicial body and the General Counsel as a prosecuting officer, requires this Court to take affirmative action. In the case of *Haleston Drug Stores, Inc.* v. *NLRB*, 187 Fed. 2d, 418,* Certiorari denied 72 S. Ct. 29, 342 U. S. 815, the 9th Circuit Court in speaking of this problem at page 421 said, "The well understood purpose of Congress here was to effect a separation of the prosecution and adjudicating functions within the Board."

A contrary position was taken by the Board at the time Robert N. Denham, Esq., was appointed General Counsel. In the case of *National Electric Products Corp.*, 80 NLRB 995, the Board ruled that the appointment of Mr. Denham who was the Trial Examiner in this case to the position of General Counsel, precluded him from preparing the Intermediate Report, under the provisions of the Administrative Procedure Act. The Board held in that case that an officer who engages in the performance of prosecuting functions, may not participate or advise in a decision or recommended decision of a case.

See also the case of *In Re Pure Oil Co.*, 74 NLRB 1382, Note 1, where the Board held that a hearing officer in a representation proceeding is not disqualified by reason of

*Senator Taft stated this to be the purpose of Sect. (3). He remarked on the fact that in recent years the Board itself had adopted regulations delegating the power of issuing complaints to the various regional directors with leave to a person aggrieved by the refusal of a regional officer to issue a complaint to appeal the matter to Washington. He observed that these appeals, according to testimony of the Chairman of the Board were considered by an anonymous committee of subordinate employees. "What the conference amendment does is simply to transfer this 'vast and unreviewable power' from this anonymous little group to a statutory officer responsible to the president and to the Congress" (93 Cong. Record 6859, June 12, 1947).

Walter Gellhorn, Director of the Attorney General's Committee on Administrative Procedure remarks of the purpose of the separation of these functions: "The opposition to lodging in one agency, the authority both to institute and to adjudicate proceedings rests on a simply stated thesis: one who resolves to maintain an action and then serves as an advocate of a particular position is incapacitated to appraise fairly and objectively the arguments advanced against the view espoused." Gellhorn, Federal Administrative Proceedings (John Hopkins 1941) P. 18.

having served as Board Attorney in a complaint proceeding involving the same employer.

Apparently, however, such division of duties as is required by the Act and Rules and Regulations promulgated by the Board itself, is not complied with by the Board and is not looked upon as a serious violation. This is brought out by the decision in the case of *H & M Manufacturing Co., Inc.*, 87 NLRB 1373, Note 4, where the evidence showed that an employee of the National Labor Relations Board, took a leave of absence and contrary to the Board's regulations, appeared as a representative of the Union at a hearing before the Trial Examiner. The Board in its decision made light of this flagrant violation of the Act by stating that since no objection was made at the hearing to the presence of the employee of the National Labor Relations Board as the representative of the Union, the employer was not prejudiced. Although the Board disapproved of this practice of its employee, it nevertheless allowed the decision to stand undisturbed.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari, should be granted.

Respectfully submitted,

EDWARD D. BOLTON,
Counsel for Petitioners.

WILLIAM J. CORCORAN,
Attorney for Local 15C, International Union of Operating Engineers, A. F. L., Petitioner.

HAROLD L. LUXEMBERG,
Attorney for United Hoisting Co., Inc., Petitioner.

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NDIX A.

APPENDIX

TUTES.

STATUTES

of the National Labor Rela-

The relevant provisions of tat. 136, 29 U. S. C. Supp. I,
tions Act, as amended (61 Stat. llows:
Sec. 151, *et seq.*), are as follow

NT RELATIONS ACT.

LABOR MANAGEMENT R

be a General Counsel of the

Sec. 3, (d) There shall be ed by the President, by and
Board who shall be appointed ite, for a term of four years.
with the consent of the Senate, Board shall exercise general
The General Counsel of the Boys employed by the Board
supervision over all attorneys and legal assistants to Board
(other than trial examiners and icers and employees in the
members) and over the office ve final authority, on behalf
regional offices. He shall have the investigation of charges
of the Board in respect of the nder Section 10, and in re-
and issuance of complaints und such complaints before the
spect of the prosecution of su other duties as the Board
Board, and shall have such o provided by law.
may prescribe or as may be pr

of the Board and the Gen-

Sec. 4. (a) Each member o ll receive a salary of $12,000
eral Counsel of the Board shall reappointment, and shall not
a year, shall be eligible for rea s, vocation, or employment.
engage in any other business, xecutive secretary, and such
The Board shall appoint an exe egional directors, and such
attorneys, examiners, and reg om time to time find neces-
other employees as it may fro nce of its duties. The Board
sary for the proper performanc s for the purpose of review-
may not employ any attorneys r preparing drafts of opin-
ing transcripts of hearings or y employed for assignment
ions except that any attorney

as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

ADMINISTRATIVE PROCEDURE ACT (60 Stat. 237, 240, 5 U. S. C. 1001, 1004 (c).

Section 5 (c) which in relevant part provides as follows:

> "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not * * * be applicable in any manner to the agency or any member or members of the body comprising the agency."

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD:

Rules 201.2 and 201.3 (13 Fed. Reg. 3090) are as follows:

Sec. 201.2 *The General Counsel.*—(a) "The General Counsel of the Board derives specific authority for his functions from the provisions of the Labor-Management Relations Act—1947. In addition, he derives certain other authority by delegation from the Board (13 F. R. 654). Under the Act the General Counsel is charged with the functions of exercising general supervision over attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He has also final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board."

Sec. 201.3 (c) *Legal Assistants.* "Each of the Five Board members has a small staff of attorneys under the general direction of a Chief Legal Assistant, to assist him in reviewing transcripts of hearings and preparing drafts of opinions."

Sec. 101.10 (29 CFR 42) *Hearings.*—"Except in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated. A duly designated trial examiner presides over the hearing.* The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint * * *."

*Formerly "a Trial Examiner designated by the Chief Trial Examiner and sent by the Washington Staff, presides over the hearing." Amended March 1, 1951, 16 FR 1935.

APPENDIX B

Bulletin No. 69

To: All Regional Directors and December 8, 1949

From: George J. Bott, Associate Ge rs-In-Charge

Subject: Training Program for Boa Counsel

The Board and the General Cou egal Assistants institute a program of field traini have agreed to Assistants. or Board Legal

This program, to begin immedia June 30, 1950, involves assignment and to run to sistants for thirty to sixty day detail oard Legal As- for purposes of becoming acquainted Regional Offices erations and procedures. In order t grass root op- members to achieve a well-rounded able these staff Office operations, they should be assi re of Regional Examiners or Attorneys conducting to assist Field vestigations, elections, settlement ne ed types of in- forcement. They should also be perm ations, and en- ing officers in representation cases and to sit as hear- case hearings. Definite assignment attend complaint been prepared but each Regional Offic dules have not advance when assignments are made. ill be notified in

The travel and per diem expenses Legal Assistants will be charged to a special project a efined in Memo- randum M-274 date October 29, 1948. The title of the project will be Legal istants Training Program, "LATP" for short. All ob ation documents and vouchers prepared for Legal As tants should be marked with this identification in orde hat the Regional Office allotment account will not be ch ged, and also to enable the Fiscal Section to figure the t of the training program. Inasmuch as the details of is program are being controlled from Washington, the itional informa- tion called for in Section II-E-5 of M norandum M-274 need not be furnished.

G. J. B.